

APPEAL NO. 160229
FILED APRIL 11, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 3, 2015, with the record closing on January 4, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the (date of injury), compensable injury extends to brachial plexus to the right shoulder, right arm, right wrist, and right hand; (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 7, 2013; and (3) the claimant's impairment rating (IR) is 13%.

The claimant appealed the hearing officer's determinations regarding MMI and IR, based upon sufficiency of the evidence contending that the certification of MMI and assignment of IR adopted by the hearing officer are contrary to the preponderance of the evidence.

The respondent (self-insured) responded, urging affirmance.

The hearing officer's determination that the compensable injury extends to brachial plexus to the right shoulder, right arm, right wrist, and right hand was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury), at least in the form of a cervical strain, right wrist strain, and right shoulder strain; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) designated doctor, (Dr. J), certified that the claimant reached MMI on March 25, 2014, and assigned an IR of 14%; (3) the treating doctor referral, (Dr. P), certified that the claimant reached MMI on November 6, 2014, and assigned an IR of 34%; (4) the self-insured's choice of doctor, (Dr. O), certified that the claimant reached MMI on September 29, 2014, and assigned an IR of 5%; and (5) the statutory date of MMI is November 6, 2014.

The claimant testified that she was injured while participating in training which required the repetitive discharge of firearms.

MMI/IR

Section 401.011(30)(A) defines MMI as “the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.” Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee’s condition as of the MMI date considering the medical record and the certifying examination.

Dr. J, the designated doctor in the case, examined the claimant on November 13, 2014, and determined that the claimant reached MMI on March 25, 2014. Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. J assigned an IR of 5% for the claimant’s cervical strain pursuant to Diagnosis-Related Estimate (DRE) Cervicothoracic Category II together with a 9% IR for range of motion loss of the right upper extremity for a total whole person IR of 14%.

Following the CCH, the hearing officer issued a letter of clarification (LOC) to Dr. J dated August 14, 2015, requesting that he provide an amended Report of Medical Evaluation (DWC-69) certifying MMI and assigning an IR which included those conditions found by the hearing officer to be a part of the compensable injury, that is the accepted conditions of cervical strain, right wrist strain, and right shoulder strain together with brachial plexus to the right shoulder, right arm, right wrist, and right hand. With his response dated August 20, 2015, Dr. J provided a DWC-69 certifying MMI on March 25, 2014, and assigning an IR of 23% comprised of 5% under DRE Category II for the cervical strain together with 19% whole person impairment calculated using Table 15 on page 3/54 of the AMA Guides, Table 11a on page 3/48 of the AMA Guides and Table 12b on page 3/49 of the AMA Guides for peripheral nerve impairment combined with abnormal motion impairment of the right upper extremity.

A second LOC was issued by the hearing officer on November 18, 2015, pointing out to Dr. J that the AMA Guides, on page 3/46, caution that “[i]f an impairment results strictly from a peripheral nerve lesion, the physician should NOT apply impairment

percents from Sections 3.1f through 3.1j (pp. 24 through 45) of [chapter 3], because a duplication and an unwarranted increase in the impairment percent would result.” In his response of November 25, 2015, Dr. J acknowledged that he erred in combining a peripheral nerve system impairment with an abnormal motion impairment of the right upper extremity. For such reason, Dr. J recalculated the claimant’s IR and submitted another DWC-69 dated November 25, 2015. In his certification dated November 25, 2015, Dr. J revised his MMI determination and found that the claimant reached MMI on May 7, 2013, “the last date of authorized [Official Disability Guidelines-Treatment in Workers’ Compensation published by Work Loss Data Institute (ODG)] recommended physical therapy services.” Dr. J also revised the claimant’s IR, assigning an IR of 13% derived from a 5% peripheral nerve system impairment of the suprascapular nerve using Tables 15 and 12b of the AMA Guides together with a 9% regional impairment of the right upper extremity from abnormal motion yielding a whole body impairment of 8% for the right upper extremity which was combined with a 5% impairment under DRE Category II for the cervical strain to obtain the IR of 13% adopted by the hearing officer.

We note from a review of the record that the claimant received physical therapy treatment after May 7, 2013, the date Dr. J determined she had reached MMI. We note further that the AMA Guides provide specific instructions on pages 3/52 and 3/53 and under Table 14, page 3/52 for rating brachial plexus-related impairments; however, Dr. J chose instead to provide a rating under Table 15, page 3/54 of the Guides for peripheral nerve impairment, a condition not determined to be part of the compensable injury. Because Dr. J failed to rate the compensable brachial plexus to the right shoulder, right arm, right wrist, and right hand as instructed by the AMA Guides or to provide an explanation for his decision to instead provide an IR for peripheral nerve deficit, we reverse the hearing officer’s determination that the claimant reached MMI on May 7, 2013, with a 13% IR.

There are two other certifications of MMI/IR in evidence. Dr. P, a referral of the claimant’s treating doctor, certified that the claimant reached MMI on November 6, 2014, with an IR of 34%. Dr. O, the self-insured’s choice of physician, certified that the claimant reached MMI on September 29, 2014, with an IR of 5%. We are unable to render a decision adopting either of these certifications because neither doctor rated the entire compensable injury. Dr. P failed to rate the compensable cervical strain and Dr. O failed to rate the compensable brachial plexus to the right shoulder, right arm, right wrist, and right hand. Accordingly, the issues of MMI and IR are remanded to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. J is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. J is still qualified and available to be the designated doctor. If Dr. J is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

If Dr. J is still qualified and available to serve as the designated doctor, the hearing officer is to advise him that the claimant received some physical therapy treatments subsequent to the date Dr. J certified MMI. Additionally, the hearing officer will request that Dr. J certify MMI and assign an IR for the compensable brachial plexus injury as instructed by the AMA Guides or explain why his rating under Table 15, page 3/54 of the AMA Guides for peripheral nerve impairment is an appropriate rating of the compensable brachial plexus to the right shoulder, right arm, right wrist, and right hand. The doctor is also to include in his certification of MMI and assignment of IR the accepted conditions of cervical strain, right wrist strain, and right shoulder strain.

In either case, the hearing officer is to advise the designated doctor that the statutory date of MMI is November 6, 2014.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/IR consistent with the evidence and this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS POLITICAL SUBDIVISIONS JOINT SELF-INSURED FUNDS** (a self-insured governmental entity) and the name and address of its registered agent for service of process is

**RANDAL M. BEACH
14990 LANDMARK BOULEVARD SUITE 300
DALLAS, TEXAS 75254.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge